ROUNDTABLE SUMMARY AND LOOKING TO THE FUTURE

Summary of Presentations

JOHN H. JACKSON*, JULIUS L. KATZ**, HUGO PAEMEN***, AND ALAN WM. WOLFF****

I. Success of the WTO Dispute Settlement System

Moderator John H. Jackson opened the roundtable by asking the panelists whether they agree with the general proposition that the dispute settlement system has been a success so far. He also asked whether there was one issue that each panelist would focus on in evaluating the performance of the system.

Julius L. Katz commented that the view that the system has succeeded so far appears to be unanimous. However, one must ask whether the system will be a victim of its own success and suffer from case overload. Many have spoken about the serious issue of strains on the system. The current caseload, however, may be the result of pent-up demand. Once that demand is satisfied, perhaps, the load will be reduced.

Katz also observed that there are no substantive negotiations currently underway. In the past, substantive negotiations have provided a venue for problem

*Professor Jackson teaches international law, and international economic law. From 1966 to 1998 he taught at the University of Michigan, and currently is University Professor of Law at the Georgetown University Law Center in Washington, D.C. as well as Hessel E. Yntema Professor of Law Emeritus at the University of Michigan. He is a graduate of Princeton University and the University of Michigan. In 1973 and 1974 he was General Counsel of the Office of the Trade Representative in the Office of the President, Washington, D.C.

**Julius L. Katz is the President of Hills & Company, International Consultants. Mr. Katz served as the Deputy United States Representative from 1989 to 1993.

***Hugo Paemen is Head of the European Commission's Washington Delegation and EU Ambassador to the United States. Previously, he served as the Commission's Deputy Director-General for External Relations in which capacity he was responsible for the Commission's negotiating team during almost the entire duration of the Uruguay Round.

****Alan Wm. Wolff is a partner with the law firm of Dewey Ballantine LLP.

solving. The absence of substantive negotiations now may be a source of additional strain.

Katz identified the additional problem that every dispute has been heard twice, once by a panel and once by the Appellate Body. During the Uruguay Round, Katz raised the issue of whether this double hearing would, in fact, transpire. Some argued that it would never happen, because the Appellate Body would hear only questions of law. However, experience has demonstrated otherwise. Katz suggested that one way to address the double-hearing inefficiency problem may be to change the makeup of panels. Another idea would be to make it more difficult to go to the Appellate Body by, for instance, making the appealing parties pay.

Alan Wm. Wolff commented that the most important question concerning the dispute settlement system is its political sustainability. During the Uruguay Round, the negotiating parties understood that they were trading unilateralism for a multilateral approach to trade disputes. The question now is whether the system is equal to the challenge before it.

Wolff agreed with Grant Aldonas that having good dispute settlement rules in place is no substitute for good substantive rules. The absence of rules poses major problems of proof. We have seen this with Japan and are likely to see it with China.

Wolff stated that, from the U.S. perspective, if there is an inability to negotiate, an apparent inability to retaliate, and no possibility to litigate (without comprehensive rules in place), then the system is defective. Thus, there is a need for new rules. Developing such rules will not be easy. Cases involving private restraints of trade, for instance, will be difficult.

Wolff commented that enhancing transparency is an important goal. Further, a standing judiciary is essential for continuity. He also urged greater private sector participation in dispute settlement.

Wolff argued that if more resources are made available to developing countries, then more resources must also be made available to developed countries with high case loads. The defending party always has an advantage with respect to the facts, because the expertise of the bureaucratic agency that has blocked imports can be brought to bear during the dispute settlement process. By contrast, the private interests within the complaining country that seek to have obstacles to free trade lifted are usually not represented in the process. This should be changed (i.e., there should be greater participation by private interests).

Wolff stated that independent review of dispute settlements by a national body, as proposed in the so-called Dole Amendment, would be a good way to evaluate the adequacy of the dispute settlement process from a domestic point of view.

Addressing the *Japan—Film* case, Wolff stated that although this was technically a loss for the United States, Japan, in defending itself, made admissions that it might not have made if the matter had not been brought before the World Trade Organization (WTO). Therefore, the dispute may not have been a total

loss for the United States. In sum, Wolff stated that the WTO members must negotiate new substantive rules to ensure that goods can be traded in open markets once they cross borders. Also, the WTO members should put a permanent judiciary in place to ensure that those rules are enforced.

Hugo Paemen stated that the European view is that the system has worked well. It has been used frequently and has resulted in some clear resolutions of disputes. Five to six years ago, the system as it is now was unimaginable. It was courageous of the United States to accept multilateral dispute settlement. On the other hand, many Europeans were comfortable with the weaknesses of the old General Agreement of Tariffs and Trade (GATT), and it was courageous of them to accept the element of automaticity in the system as it now exists. However, it is still too early to reach a final opinion on the success of the new dispute settlement system.

Paemen stated that, for traditional trade disputes, the system has worked well. However, in cases at the intersection between traditional trade matters and domestic policy (i.e., cases dealing with the environment, health and safety, and national security) the record of the new system has been mixed. *Japan—Film* and *EU—Beef Hormones* are illustrations of problems at this intersection.

Referring to the Appellate Body's *EU—Beef Hormones* decision, Paemen stated that the WTO should not be a standards-setting body. Rather, it must incorporate standards set by other bodies. He commented that, in the future, a number of alternatives were open to the WTO. It might try to take a more active regulatory approach, or, it might take a more low-key approach and it might follow the rules set by other international bodies. A better approach would be to discuss openly the issues that arise at the intersection between trade law and domestic policy, such as trade and the environment and trade and competition policy. The WTO should take these issues up as soon as possible, rather than be confronted by them in a crisis.

II. Constraints on the System and the Creation of New Substantive Rules

Jackson then commented that there is a tension between the constraints within the WTO Charter and the Understanding on Rules & Procedures Governing the Settlement of Disputes (DSU), on the one hand, and the desire to create new substantive rules on the other. It is difficult to create new substantive rules through negotiation. Therefore, there is a temptation to push the limits of the DSU rather than negotiate new substantive rules. Jackson asked the panelists whether this tension suggests that the WTO has a fatal flaw.

Katz responded that part of the problem is the current absence of a negotiating round. It is difficult to deal with issues on a one-by-one basis. There is a better chance of solving problems when they are part of a larger package.

Wolff commented that there will be a demand for deeper integration within the WTO. Market forces are leading that way. For instance, there is a need to

deal with the problem of state-owned enterprises. In addressing these issues now, we need to understand how to apply existing rules successfully.

Paemen commented that overall, there is a need for greater cooperation between the WTO and other international organizations, dealing for example with environmental or labor policy.

Steve Charnovitz suggested that there may be a third option between negotiating new substantive rules and pushing the limits of the dispute settlement mechanism. That option is to enhance linkages between the WTO and other international organizations and non-governmental organizations.

III. Integration of Government-to-Government Disputes into the System

Tom Brewer commented that, in the area of investment protection, there already exists a massive network of rules and dispute settlement procedures at various levels of government. Dispute settlement outside of the WTO includes investor-to-government disputes, as well as government-to-government disputes. He asked the panelists to comment on the proposal that government-to-government investment dispute settlement procedures be integrated into the WTO, but that investor-to-government dispute settlement procedures be kept outside the WTO.

Wolff agreed with Brewer's proposition. He added that governments should be required to give an explicit warranty of market access with respect to investment and competition policy, once goods and services have gotten across the border. In responding to Jackson's question about what he meant by a "warranty," Wolff said that, with respect to market-restricting actions by private entities, a warranty would require a government to pay compensation if, for instance, a cartel were in place and the government took no action to break it up. This would be an extension of article XXIII of the GATT 1994. The parties would have to achieve this goal through negotiations, since a warranty would apply to all conditions of domestic regulation.

Paemen then commented that dispute settlement within the WTO happens between governments. During negotiations in the Uruguay Round, there was a general sentiment that private parties should not be allowed to participate. Paemen stated that he favors a greater degree of openness, but not actual private party participation in WTO dispute settlement.

Katz responded that a warranty sounded sensible. However, he questioned whether such a concept could be reconciled with the idea that competition policy should not be brought within the WTO. The WTO can't have rules that address private party conduct without having substantive rules on competition policy. He believes that it will be a long time before the WTO develops rules on competition policy.

Responding to Brewer's question, Katz stated that investment rules should be brought within the WTO, and the sooner the better. He hoped that efforts within the WTO would be more successful than efforts to agree to an Multilateral

Agreement on Investment (MAI) within the Organization for Economic Control and Development (OECD). He observed that bringing investment protection within the WTO could even include the handling of investor-host state disputes within the dispute settlement system.

IV. Establishing a Professional Judiciary

Robert Hudec commented that the WTO Secretariat has indicated that, given the difficulties encountered in appointing a professional Appellate Body, it would not want to tackle the establishment of a professional judiciary. Setting up such a judiciary would involve lots of "horse trading," with each country insisting that its own candidates be represented. He asked the panelists to comment on how national governments are likely to react to the creation of permanent panels or making the Appellate Body a more permanent and professional body than it is today.

Katz stated that the United States probably would be the first country to express anxiety over the creation of a professional WTO judiciary. Given the concerns expressed over loss of sovereignty during the Uruguay Round, Katz was skeptical that a professional WTO judiciary would get much support in the United States. It may be a good idea, but its promoters would have to educate a lot of policymakers first.

Paemen commented that, in discussing the option of creating a professional judiciary, we must consider where we have come from. He observed that the WTO is well on its way to keeping politics out of the dispute settlement system. He noted that it is impressive how easily the Europeans and Americans have accepted decisions by WTO panels. Given how much has been achieved thus far, Paemen was skeptical as to whether there is much to be gained from attempting to go further. The WTO should not diverge too much from what the GATT was: a place where parties come to solve problems, and, to that end, the consultation phase of dispute settlement remains very important. Dispute settlement by panels and the Appellate Body is important too, but most cases are resolved at the consultation phase, and the benefits of that type of resolution should not be lost.

Wolff responded that the success of the consultation phase in dispute settlement would not be harmed by creating a standing professional judiciary.

In response to the question of what negotiating leverage countries will have in the next round, absent a return to unilateralism, Wolff responded that discontent with the status quo will drive the next round of negotiations. Either multilateralism must become more effective, or the United States will return to unilateralism or bilateralism.

V. Success with Small as Opposed to Large Cases

The panelists were asked to comment on the following proposition: the WTO has dealt well with small cases, but has not done a good job with big cases, such as *Japan—Film*.

Paemen responded that the problem in *Japan—Film* was the absence of WTO provisions to deal with conflicting national competition rules. A similar problem characterized the *EU—Beef Hormones* case. When the WTO falters, it is due to the absence of substantive rules.

Katz disagreed that the system has dealt well only with small cases. He observed that the *Oilseeds* case was enormous (although it arose under the GATT 1947). There also may be an inhibition on the part of WTO Members to bring large cases, but that does not affect the generally positive appraisal of the dispute settlement system.

Wolff commented that there are big issues on the horizon, including China's accession to the WTO and the opening of Japan's markets to competition. If the WTO doesn't cover enough substantive areas, it will not be considered a success. That is what Congress will look at in 2000. However, one should not dismiss the significance of the successes thus far.

VI. Dispute Settlement and the Helms-Burton Act

The panelists were asked to comment on the WTO's likely approach to the Helms-Burton Act if it comes up for dispute settlement.

Katz stated that a dispute over the Helms-Burton Act does not belong in the WTO. It is in no one's interests to push this dispute to an illogical conclusion. The trade effects of the Act are, in fact, minimal. It is a terrible law that is hard to defend. However, it is also easy to exaggerate the law's actual importance. The dispute settlement system should not be jeopardized over a bad case.

Wolff commented that the Helms-Burton Act is the first in a string of ill-advised sanctions policies. Some of these sanctions will have a real impact on trade. It would be wise to resolve disputes over these sanctions outside of the WTO. However, it is not for the United States to say that it will decide whether to show up for dispute settlement in Geneva. The United States should show up.

Katz agreed that the United States should show up for dispute settlement over U.S. sanctions legislation. He added that the United States should also not invoke national security in response to such disputes. However, it is a mistake for the European Union to push such disputes to resolution. Katz added that sanctions by individual states within the United States (such as the sanctions by Massachusetts directed against Burma) are probably unconstitutional and should be dealt with in the courts of the United States.

VII. Competition Policy and the Dispute Settlement System

The panelists were asked whether the parties negotiating the WTO Agreements thought that it would be feasible to deal with a case such as *Japan—Film* through the mechanisms established by the DSU.

Katz responded both yes and no. He observed that the United States had declined to agree to the original Havana Charter of the International Trade Organization,

in part, because it dealt with private party conduct. Under President Bush, the United States undertook the Structural Impediments Initiative with Japan, however, which did deal with private party conduct. The United States considers private party conduct an issue, but not a WTO issue.

Wolff stated that it should be emphasized that in *Japan—Film* the United States did not challenge private party conduct. The United States challenged only measures by the Government of Japan. Article XXIII is designed to cover any government measures that nullify or impair trade benefits. So, prospectively, it was designed to cover a case such as *Japan—Film*.

Paemen stated that private party conduct was not an issue on the agenda at the beginning of the Uruguay Round. At the signing of the Uruguay Round Agreements in Marrakesh, Morocco in 1994, trade and competition policy was listed as a prospective issue to be dealt with by the WTO.